

Legal Issues Regarding the Proposed Rules in the Petition

House Bill 521 Issues

The proposed standards for EC and SAR in the Petition are intended to "equitably allocate" the "assimilative capacity" of the entire river length. *See* Petition at p. 32. The "assimilative capacity" of a river refers to the amount of water in the river that is "higher" quality than necessary to protect the designated uses of the water. Water quality standards that protect the "assimilative capacity" of a stream are more stringent than comparable federal standards or guidelines, because federal guidelines require states to adopt standards that protect the designated "fishable/swimmable" uses of the water, not the assimilative capacity of the water. *See* 40 C.F.R. § 130.3 and § 131.11 If the Board adopts standards that protect the assimilative capacity of a stream, then the Board must also make certain written findings.

Under § 75-5-203(2)(a), MCA, the Board may adopt a rule that is more stringent than a comparable federal guideline, if it makes a written finding that "the proposed state standard or requirement protects public health or the environment of the state..." and that the proposed standard or requirement "can mitigate harm to public health or the environment." The Department interprets this latter provision to require that the proposed standard or requirement provide a greater degree of protection to public health or the environment than the federal regulation or guideline. In addition, under § 75-5-309, MCA, the Board is required to find that, for any rules that are more stringent than federal regulations or guidelines, the rules "...are necessary to protect the public health, beneficial use of water, or the environment of the state." Since the proposed standards are intended to protect the assimilative capacity of a stream rather than protect public health or the environment, the Board could not make the necessary findings required by § 75-5-203, MCA and § 75-5-309, MCA. Consequently, under the Department's interpretation, the Board could not adopt the proposed standards in the Petition that are more stringent than comparable federal regulations.

Finally, the Department believes that adopting water quality standards to protect the assimilative capacity of a water body is likely beyond the authority of the Board to adopt standards that protect the beneficial uses of the water. *See* § 75-5-301(1), MCA.

Rulemaking Authority Issues

On page 37 of the Petition, the Petitioners request the Board to adopt a rules that would require the Department to do the following: (1) collect baseline data on the tributaries; (2) conduct a survey of irrigation practices and prepare a report; (3) develop numeric standards for EC and SAR for all tributaries within approximately 24 months; (4) develop a total maximum daily load (TMDL) for the mainstem of the rivers and streams where EC and SAR standards have been adopted; (5) develop and implement a regional monitoring plan; and (6) identify and establish numeric EC and SAR standards for other water bodies. For the reasons given below, the Department believes that there is a substantial question as to whether the Board's authority to adopt rules includes the authority to adopt rules requiring the Department to collect water quality data, conduct monitoring, or to develop TMDLS, as set forth in the Petitioner's proposal.

Under Montana's Water Quality Act, the Board has broad authority to "...adopt rules for the administration of this chapter." § 75-5-201, MCA. In addition, the Board has specific rulemaking authority to adopt water quality standards (§ 75-5-301, MCA), adopt rules implementing the State's nondegradation policy (§ 75-5-303, MCA), adopt standards for the treatment of wastes (§ 75-5-305, MCA), and adopt rules governing the issuance of permits (§ 75-5-401, MCA). Although the Board has authority to adopt rules under the statutes cited above, the Department has authority independent from the Board under various provisions of Montana's Water Quality Act. Specifically, the Department has statutory authority to monitor state waters to assess their quality, to develop lists of "threatened" or "impaired" streams based upon its monitoring efforts, and to develop TMDLs for waters identified as "threatened" or "impaired." *See* § 75-5-701, MCA, *et seq.* Consequently, the any rule adopted by the Board that seeks to control the Department's discretion in conducting these activities may exceed the Board's authority to adopt rules under the Water Quality Act.